UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANDRE ROYAL, Plaintiff, -against- NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL, NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, RETIREMENT BOARD OF THE BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN, KATHERINE "KATIE" BLACKBURN, RICHARD "DICK" CASS, TED PHILLIPS, SAMUEL MCCULLUM, ROBERT SMITH, AND JEFFREY VAN NOTE, Defendants.	No. 1:19-cv-05164-AJN

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION'S MOTION TO DISMISS AMENDED COMPLAINT

William G. Miossi
(*pro hac vice petition forthcoming*)
Mary M. Lenahan
(*pro hac vice petition forthcoming*)
Paul N. Harold
(*pro hac vice petition forthcoming*)
Winston & Strawn LLP
1700 K Street NW
Washington, DC 20006
Tel.: (202) 282-5000
Fax: (202) 282-5100
wmiossi@winston.com
mlenahan@winston.com
pharold@winston.com

Jeffrey L. Kessler
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166-4193
Tel: (212) 294-6700
Fax: (212) 294-4700
jkessler@winston.com

Counsel for Defendant
National Football League Players Association

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PRELIMINARY STATEMENT

Plaintiff, Andre Royal, is a participant in an ERISA benefits plan providing disability benefits to professional football players. Royal petitioned for and began receiving disability benefits. Fifteen years later, Royal decided that he should have originally applied for a different, higher-paying category of disability benefits, and so he petitioned for reclassification to a more generous level of benefits. The board administering the plan denied that petition for failure to show changed circumstances, a showing required by the plan to justify reclassification. Royal believes that he was never told the standard for showing changed circumstances (Counts I & II). Royal has now sued the board, its individual members, and the employers and union that collectively bargained the plan, having largely copied his complaint and amended complaint (including typos) filed in an unrelated case pending against the same defendants, *Hudson v. Nat'l Football League Mgmt. Council, et al.*, No. 1:18-cv-4483 (S.D.N.Y. filed May 22, 2018). The claims against the union should be dismissed for failure to state a claim on which relief can be granted and for lack of standing, just as Judge Woods and Magistrate Judge Lehrburger dismissed the claims in *Hudson*. *See Hudson v. Nat'l Football League Mgmt. Council, et al.*, No. 1:18-CV-4483-GHW-RWL, 2019 WL 4784680 (S.D.N.Y. Sept. 30, 2019); Dkt. 16-3 ("*Hudson* R&R").

Defendant National Football League Players Association ("Players Association") is the union that collectively bargained the plan with Defendant National Football League Management Council, the representative of the NFL's various employers. Because the plan is a collectively bargained, jointly administered multiemployer plan, the Players Association appoints half of the members of the board that administers the plan. Royal alleges that the Players Association breached its fiduciary duty "to properly monitor [its] appointees" to ensure that they were not breaching their fiduciary duties under ERISA (Count III). Am. Compl. ¶ 80. Royal has also sued all defendants, including the Players Association, seeking a declaratory judgment that an

unidentified 2017 amendment does not apply to him (Count IV), and that a limitations provision in the plan cannot be applied to block his claims (Count V). Each claim fails.

Fiduciary duties under ERISA are limited. "A person is only subject to [ERISA's] fiduciary duties 'to the extent' that the person" exercises or has "'discretionary authority.'" *In re Citigroup ERISA Litig.*, 662 F.3d 128, 135 (2d Cir. 2011) (quoting 29 U.S.C. § 1002(21)(A)). The Players Association does not have discretionary authority over the issues about which Royal complains—such discretion is "full[y] and absolute[ly]" vested with the board. Dkt. 16-5 (Plan § 8.2). Thus, the Players Association does not have "the responsibility to supervise, evaluate, or second-guess [its appointee's] substantive decisions." *Hudson* R&R at 36.

Regardless, "Plaintiff's allegations are not sufficient to state a breach of the duty to monitor, even as Plaintiff conceives of that duty." *Hudson*, 2019 WL 4784680, at *3. The "complaint says absolutely nothing about the actions of . . . the [Players] Association with regards to [its] duty to monitor," and instead "simply states that because breaches occured . . . the [Players] Association must not have properly monitored." *Id.* "That is not enough to state a claim." *Id.* Otherwise, "'every employer or union that appoints plan trustees [would be] liable for every alleged act or omission of those trustees.'" *Id.* (quoting *Hudson* R&R at 35).

Royal's final two claims are derivative and just as lacking. Royal's Count IV seeks an advisory ruling that an unidentified amendment does not apply to him. Royal has not alleged that the Players Association is a fiduciary with respect to that decision, and in any event, he lacks standing to challenge that amendment because he has not alleged any injury fairly traceable to it. Royal's Count V, which alleges that a limitations provision in the plan is ambiguous and, under one alleged interpretation, might be applied to limit his claims, fails for similar reasons.

All of Royal's claims against the Players Association should be dismissed.

STATEMENT OF FACTS

I. The Defendants

The National Football League Players Association is the labor organization representing the professional football players in the National Football League. Am. Compl. ¶ 20. The Players Association is a union and the exclusive collective bargaining representative of all present and future NFL players.

The National Football League Management Council ("Management Council") is a non-profit association of NFL clubs. Am. Compl. ¶ 19. There are 32 separately owned and operated professional football franchises, and the Management Council is the exclusive bargaining representative of all present and future employer member franchises of the NFL.

The Bert Bell/Pete Rozelle NFL Player Retirement Plan (the "Plan") was created through collective bargaining between the Players Association and the Management Council. Dkt. 16-5 at 1.[1] It "differ[s] from the typical employer sponsored and administered plan in that [it was] established through collective bargaining between the employees and employers." *Courson v. Bert Bell NFL Player Ret. Plan*, 75 F. Supp. 2d 424, 431 (W.D. Pa. 1999). It is a jointly administered, multiemployer, labor management trust fund established and maintained under

[1] In "the ERISA context, 'because the Plan is directly referenced in the complaint and is the basis of this action, the Court may consider the Plan in deciding the motion to dismiss.'" *Cent. States, Se. & Sw. Area Health, & Welfare Fund v. Gerber Life Ins. Co.*, 984 F. Supp. 2d 246, 249 (S.D.N.Y. 2013). A copy of the 1995 Plan document in effect at the time of Royal's initial application is attached to the Retirement Board's motion to dismiss as Exhibit C. *See* Dkt. 16-5 (Ex. C to the Decl. of Michael L. Junk). Royal alleges this Plan document governed his initial claim. *See* Am. Compl., Dkt. 15 ¶ 29 ("Plaintiff originally filed his initial claim for disability benefits under the 1995 Plan . . ."). A copy of the 2009 Plan document is attached to the Retirement Board's motion to dismiss as Exhibit G. *See* Dkt. 16-9 (Ex. G to the Decl. of Michael L. Junk). Royal references the 2009 Plan document throughout his complaint and he alleges that it governs his claims. *E.g.*, Am. Compl., Dkt. 15 ¶ 21 ("The relevant written instrument of the Plan within the meaning of ERISA § 402(a) is the Bert Bell/Pete Rozelle NFL Player Retirement Plan Amended and Restated as of April 1, 2009.").

various collective bargaining agreements in accordance with Sections 302(c)(5) and (c)(6) of the Labor Management Relations Act of 1947 (the "LMRA").

The Retirement Board of the Bert Bell/Pete Rozelle NFL Player Retirement Plan (the "Retirement Board") is the Plan administrator and the Plan's named fiduciary. Am. Compl. ¶ 21. The Retirement Board is "responsible for implementing and administering the Plan, subject to the terms of the Plan and Trust," and has "full and absolute discretion, authority and power to interpret, control, implement, and manage the Plan and the Trust." Plan § 8.2. The Retirement Board has six voting members. Am. Compl. ¶ 21. Because the Plan is a trust fund established under the LMRA, "employees and employers [must be] equally represented in the administration of such fund" (29 U.S.C. § 186(c)(5)(B)), and accordingly, the Players Association and the Management Council each appoint three voting members (Am. Compl. ¶ 21). Six individuals who serve as voting members of the Retirement Board are also defendants.[2] Am. Compl. ¶¶ 22–27.

II. The Plan

The Plan provides retirement, disability, and related benefits to eligible professional football players.[3] Am. Compl. ¶ 29. As relevant here, the Plan provides multiple categories of disability benefits (termed "total and permanent disability benefits"), two of which bear on Royal's claims: (i) an "Active Football" category for a player whose disability "results from League football activities, arises while the Player is an Active Player, and causes the Player to be totally and permanently disabled 'shortly after' the disability[] arises." (Am. Compl. ¶ 34 (quoting Plan § 5.1(a))), and (ii) a "Football Degenerative" category for a benefit-eligible retired player whose

[2] The complaint describes the members of the Retirement Board as members "on the Retirement Board of Directors" (Am. Compl. ¶¶ 22–27), but the members of the Retirement Board do not have the title "director" nor is the Retirement Board itself a board of directors.

[3] Although the complaint at times refers to the Plan as an "ESOP," an undefined term that presumably stands for employee stock ownership plan (Am. Compl. ¶ 21), the Plan is not an ESOP.

disability "arises out of League football activities, and results in total and permanent disability before fifteen years after the end of the Player's last Credited Season" (Am. Compl. ¶ 34 (quoting Plan § 5.1(c))). Active Football category benefits have been greater than Football Degenerative category benefits. Am. Compl. ¶ 73.

III. The Players Association's Alleged Fiduciary Status and Duties

"ERISA provides for both named and de facto fiduciaries." *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 763 F. Supp. 2d 423, 565 (S.D.N.Y. 2011). Royal does not allege that the Players Association is a named fiduciary, i.e., a fiduciary named in the Plan document "that possess[es] the 'authority to control and manage the operation and administration of the Plan.'" *Id.* (quoting ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1)). Rather, Royal alleges that the Players Association is a de facto fiduciary, i.e., "a fiduciary to the extent that [it] 'exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,' or 'has any discretionary authority or discretionary responsibility in the administration of such plan.'" *Id.* (quoting ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A)). *See* Am. Compl. ¶ 20 ("By virtue of these powers to appoint and remove other fiduciaries, Defendant NFL Players Association was a fiduciary of the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) . . .").

Thus, Royal alleges that the Players Association is a fiduciary "to the extent" it has the power to appoint and remove three of the six voting members of the Retirement Board. 29 U.S.C. § 1002(21)(A); Am. Compl. ¶ 20.[4] According to Royal, it therefore "has an obligation to

[4] Royal alleges that the Players Association can remove and appoint replacements for the Management Council's appointees, but this appears to be a typographical error. Am. Compl. ¶ 20. The Plan document says that "The NFLPA and the Management Council will have the authority to remove and appoint a replacement for any member on the Retirement Board either has *respectively appointed*." Plan § 8.1 (emphasis added). And Royal's allegations elsewhere in the complaint reflect this. Am. Compl. ¶ 78 (alleging that the Management Council and Players

undertake an appropriate investigation that the fiduciary [it appoints] is qualified to serve in the position as fiduciary and at reasonable intervals to ensure that the fiduciary who has been appointed remains qualified to act as fiduciary and is acting in compliance with the terms of the Plan and in accordance with ERISA." Am. Compl. ¶ 77.

Nevertheless, despite alleging only that the Players Association's power extends to appointment and removal of three voting members of the Retirement Board, Royal alleges that the Players Association's duties are broader than its powers. Royal alleges that the Players Association "had the fiduciary responsibility to monitor the Retirement Board *as an entity* . . . and *remedy any fiduciary violations committed by the Retirement Board*." Am. Compl. ¶ 20 (emphasis added). Even though the Players Association has no power (alleged or otherwise) to require the Retirement Board to act, Royal alleges that the Players Association had a duty to "require the Board" to take certain steps, including "revis[ing] the SPD," "disclos[ing]" interpretations of Plan terms, "utiliz[ing] [certain] definitions" of Plan terms, and "review[ing] and reevaluat[ing]" prior claims for reclassification. Am. Compl. ¶ 80. Even though the Players Association has no power (alleged or otherwise) to amend the Summary Plan Description, Royal alleges that the Players Association had a duty to "remove [certain] language in the SPD." Am. Compl. ¶ 80.

IV. Royal and His Claims

Royal is a participant in the Plan. Am. Compl. ¶ 18. Royal's NFL career began in 1995. Am. Compl. ¶ 18. "Just three years into his professional career, . . . Royal began suffering from petit mal seizures." Am. Compl. ¶ 40. "Although Royal was suffering from petit mal seizures, he continued to play football" for two more years until his seizures "turned into grand mal seizures," "forc[ing] him to retire" in 2000. Am. Compl. ¶ 40. A few months after retiring, Royal applied

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Association may "remove and appoint a replacement for any member of the Retirement Board that they had appointed").

for Football Degenerative category benefits, and the Retirement Board approved Royal's application. Am. Compl. ¶¶ 41–44.

In May 2015, Royal "realiz[ed] that he was not receiving the Active Football benefits he should have been entitled to" originally. Am. Compl. ¶ 47. And so, nearly 15 years after his original application, Royal asked the Retirement Board to review his original application and reclassify his benefits to the higher-paying, Active Football category. Am. Compl. ¶ 49. The Retirement Board denied Royal's request for reclassification because Royal did not "present clear and convincing evidence that [Royal] meet[s] the qualifications for the Active Football category and because of changed circumstances." Am. Compl. ¶ 48.

Royal filed suit on June 1, 2019, with a complaint largely copied from the complaint in *Hudson v. National Football League Management Council et al.*, 18-cv-04483-GHW-RWL. Dkt. 1. On August 5, the Board Defendants moved to dismiss the Complaint and strike Royal's jury demand. Dkt. 7. On August 15, Royal responded to the Court's order (Dkt. 12) and notified the Court that he would amend the Complaint rather than respond to the Retirement Board's motion to dismiss (Dkt. 14). Royal filed his Amended Complaint on August 26. Dkt. 15. On September 5, Magistrate Judge Lehrburger issued a 60-page Report and Recommendation recommending that the complaint in *Hudson* be dismissed with prejudice. *Hudson* R&R. On September 9, the Retirement Board again moved to dismiss. Dkt. 16. On September 30, Judge Woods accepted Magistrate Judge Lehrburger's Report and Recommendation and dismissed all claims, while granting Hudson 30 days to amend Counts II and III. *Hudson*, 2019 WL 4784680, at *1.

The gravamen of Royal's claims is an allegation that the Retirement Board violated ERISA when it failed to explain sufficiently the meaning of "clear and convincing evidence" and "changed circumstances." Am. Compl. ¶¶ 51–74 (Counts I & II). Royal also seeks to hold the Players

Association and Management Council liable insofar as they "fail[ed] to properly monitor" their respective appointees to the Retirement Board. Am. Compl. ¶¶ 75–81 (Count III). And finally, Royal has sued all defendants on two final, derivative claims: he challenges an unidentified "2017 Amendment" (Am. Compl. ¶¶ 82–87 (Count IV)), and a Plan provision regarding the limitations period (Am. Compl. ¶¶ 88–98 (Count V)).

ARGUMENT

I. Royal has failed to plead a duty-to-monitor claim (Count III).

A. The Players Association has no duty to monitor the Retirement Board.

Unlike most benefit plans, which are created and sponsored by a single employer, the Plan is a jointly administered multiemployer plan created through collective bargaining. Because the Plan is collectively bargained, the Players Association cannot unilaterally alter the Plan or otherwise exercise discretion over the Plan's administration or management. That "full and absolute discretion" lies solely with the Retirement Board. Plan § 8.2; *see also* Am. Compl. ¶ 21 (alleging that the Retirement Board is "the designated Plan Administrator" and "named fiduciary"). Because the Players Association does not exercise discretion over the Plan's "management . . . [or] administration" (29 U.S.C. § 1002(21)(A)), it cannot be a fiduciary under ERISA and thus has no fiduciary duty to remedy the Retirement Board's alleged breaches or to monitor the Retirement Board. The Second Circuit has never recognized a fiduciary duty under ERISA to monitor appointees—in any circumstance—and the Court should not do so here, where the Plan is a jointly administered, collectively bargained multiemployer plan. Thus, the Players Association has no duty to monitor the substantive decisions of its appointees, as Judge Woods and Magistrate Judge Lehrburger just found in the case from which Royal copied his allegations. *Hudson* R&R at 33–41.

Royal must show, for each act he alleges that the Players Association should have taken, that the Players Association had the discretionary authority to take that act. "A person is only subject to fiduciary duties 'to the extent' that the person" exercises or has "'discretionary authority.'" *In re Citigroup ERISA Litig.*, 662 F.3d at 135 (quoting 29 U.S.C. § 1002(21)(A)); *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1259 (2d Cir. 1987) ("Under this definition [in § 1002(21)(A)], a person may be an ERISA fiduciary with respect to certain matters but not others, for he has that status only 'to the extent' that he has or exercises the described authority or responsibility."). Thus, "a person may be an ERISA fiduciary with respect to certain matters but not others" and in ERISA suits, "the 'threshold question' is whether the defendants were acting as fiduciaries 'when taking the action subject to complaint.'" *Id.* (quoting *Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co.*, 302 F.3d 18, 28 (2d Cir. 2002), and *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000)). Where a party "has no authority to [act], it cannot be held liable for failing to take that action." *In re Bear Stearns*, 763 F. Supp. 2d at 566.

The Players Association's fiduciary status "can be determined as a matter of law at the motion to dismiss stage" (*In re Bear Stearns*, 763 F. Supp. 2d at 565), and it is not a fiduciary. The Players Association does not have the power or obligation to remedy the Retirement Board's breaches, and it has no fiduciary duty to monitor its appointees.

1. The Players Association has no duty to remedy the Retirement Board's alleged breaches.

Nearly all of Royal's allegations concern the Players Association's alleged failures with respect to the "Retirement Board *as an entity*." Am. Compl. ¶ 20 (emphasis added); *see also id.* (alleging a "fiduciary responsibility to . . . remedy any fiduciary violations committed by the Retirement Board"). Yet the Players Association has no discretionary authority over the Retirement Board "as an entity" (*id.*) and thus cannot be held liable for failing to prevent or correct

the Retirement Board's alleged breaches. Royal faults the Players Association for not "requir[ing] the Board" to take certain steps (Am. Compl. ¶ 80), but the Players Association does not have that authority and Royal does not allege otherwise. Royal also faults the Players Association for not itself "remov[ing] language in the SPD" (*id.*), but the Players Association does not have that authority either. The Players Association is not a fiduciary with respect to these matters, and to that extent, Royal's claim must be dismissed.

Royal asserts that the Players Association is a fiduciary because "when acting jointly with the Management Council [it] ha[s] the power to amend the Plan" (Am. Compl. ¶ 20) and because it appoints "three" of the "six voting members" of the Retirement Board. Am. Compl. ¶ 21. Neither of these powers gives the Players Association control over the Retirement Board as an entity or empowers the Players Association to alter the Summary Plan Description. Royal never alleges that the Players Association itself manages or administers the Plan. Royal's allegations cannot support the breadth of his claim.

First, Royal alleges that "the NFL Players Association when acting jointly with [the] Management Council had the power to amend the Plan," but he never connects this alleged authority to any of the alleged breaches, and it could not provide a basis for liability anyway. Am. Compl. ¶ 20. None of the things Royal alleges the Players Association "should have done" involved amending the Plan. Am. Compl. ¶ 80. In any event, it is well-settled that there is no general fiduciary duty to amend a plan. *E.g.*, *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999) (holding that the "act of amending . . . does not constitute the action of a fiduciary"); *Lockheed Corp. v. Spink*, 517 U.S. 882, 891 (1996) ("[T]he act of amending a pension plan does not trigger ERISA's fiduciary provisions."); *Janese v. Fay*, 692 F.3d 221, 227 (2d Cir. 2012)

(applying *Hughes Aircraft* to conclude that trustees of a multiemployer plan "were not acting as fiduciaries when they amended the plans").

More specifically, as a rule, the Players Association's power to negotiate the terms of the Plan through collective bargaining cannot make it an ERISA fiduciary. Royal acknowledges that the plan can be amended only when the Players Association is "acting *jointly* with the Management Council," i.e., through collective bargaining. Am. Compl. ¶ 20 (emphasis added); Plan § 10.2. The collective bargaining of Plan terms is beyond ERISA's purview and is not a fiduciary act. The process of negotiation is one of "compromise and economic pressure," where a union must negotiate with employers while fairly representing all its members, not merely the subset of members who participate in certain benefit plans. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 336 (1981). The standards governing collective bargaining are "wholly inconsistent" and "totally alien" to an ERISA fiduciary's obligation. *Id.* at 336–37. "[I]mpos[ing] fiduciary status on union negotiators would unreasonably cramp legitimate negotiations, presumably forcing negotiators to arbitrarily favor a single group of employees." *United Indep. Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1262, 1267 (7th Cir. 1985). And unions are thus not ERISA fiduciaries by virtue of their ability to collectively bargain plan terms. *Id.*; *see also Maldonado v. Columbia Presbyterian Med. Ctr.*, 1990 WL 17635, at *5 (S.D.N.Y. Feb. 21, 1990) ("[A] union engaged in negotiating the terms and conditions of future benefits cannot be regarded as an ERISA fiduciary in respect of plans in place.").

Second, the Players Association's ability to appoint "three" of the Retirement Board's "six voting members" does not make it an ERISA fiduciary either. Am. Compl. ¶¶ 20–21. The Players Association does not appoint a majority of the Retirement Board, and thus cannot exercise "discretion[]" over the "administration of the plan." 29 U.S.C. § 1002(21)(A). "It is not enough

to argue, as plaintiff has done, that the union is a fiduciary . . . because it elected three of its members to the six-member [Board]." *Breaux v. Pipefitters Local Union 195*, 807 F. Supp. 42, 45 (E.D. Tex. 1992). As explained below (*infra* at 14–17), Royal never makes any allegations specific to the Players Association's appointees. Nor does he allege that a minority of the Retirement Board could have acted to prevent the alleged harms. Indeed, the Second Circuit has expressed doubt that *even union appointees themselves* were fiduciaries where the relevant "discretion" was "reserve[d] . . . to a majority of the trustees." *Alfarone v. Bernie Wolff Const. Corp.*, 788 F.2d 76, 79 n.1 (2d Cir. 1986).

The Players Association's appointees to the Retirement Board are not its agents. The unique structure of the Retirement Board is dictated by the Labor Management Relations Act, and although the LMRA "requires an equal balance between trustees appointed by the union and those appointed by the employer, nothing in [it] reveals any congressional intent that a trustee should or may administer a trust fund in the interest of the party that appointed him, or that an employer [or union] may direct or supervise the decisions of a trustee he has appointed." *Amax Coal Co.*, 453 U.S. at 330. Similarly, ERISA "funds are [not] agents of . . . unions and [are not] controlled by . . . unions." *Sciss v. Metal Polishers Union Local 8A*, 562 F. Supp. 293, 294–95 (S.D.N.Y. 1983) (citing *Amax Coal Co.*, 453 U.S. at 331–32).

As Magistrate Judge Lehrburger recognized, "[i]n multi-employer plans, such as the one here, the [Labor Management Relations Act] prohibits an appointing party from directing or supervising the decisions of the independent board members." *Hudson* R&R at 35 (citing 29 U.S.C. § 186; *Amax Coal Co.*, 453 U.S. at 329–30; *Rothstein v. Am. Int'l Group, Inc.*, 837 F.3d 195, 209 (2d Cir. 2016)); *see also id.* at 20–21.

Finally, nothing in the Plan otherwise gives discretion to the Players Association. "The Plan documents in no way give the Union any discretionary authority or control to manage, administer, or interpret the Plan, or to manage or dispose of the Plan's assets." *Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1101 (9th Cir. 2004) (finding that a union was not a fiduciary). Ultimate fiduciary responsibility lies with the Retirement Board only. *Cf. In re Bear Stearns*, 763 F. Supp. 2d at 569 ("In this Circuit, an employer cannot be a de facto plan administrator where it has named an administrator."); *Maldonado*, 1990 WL 17635, at *5 (holding that a union was not an ERISA fiduciary and that "the Fund is the sole fiduciary of the plan negotiated between the Union and the [Employer]").

In sum, the Players Association has neither the power nor the duty to remedy the Retirement Board's alleged breaches.

2. The Players Association has no duty to monitor.

The Players Association has no fiduciary duty to monitor its appointees. Royal alleges that the Players Association may appoint three voting members of the six-voting-member Retirement Board. This appointment power, Royal alleges, creates a duty "to undertake an appropriate investigation that the fiduciary is qualified to serve . . . and at reasonable intervals to ensure that the fiduciary who has been appointed remains qualified . . . and is acting in compliance" with the Plan and ERISA. Am. Compl. ¶ 77. But "[t]he text of ERISA does not explicitly impose a duty to monitor on plan fiduciaries" and "the Second Circuit has not spoken on this issue." *E.g.*, *In re Bank of Am. Corp. Sec., Derivative, & Empl. Ret. Income Sec. Act (ERISA) Litig.*, 756 F. Supp. 2d 330, 359 (S.D.N.Y. 2010). In any event, this duty applies only to "those who are already ERISA fiduciaries" (and thus delegating their own fiduciary authority), and as explained above, the Players Association is not a fiduciary. *In re WorldCom, Inc.*, 263 F. Supp. 2d 745, 760–61 (S.D.N.Y. 2003) (rejecting the argument that "WorldCom's directors were the individuals who

held the authority to appoint and remove Plan fiduciaries, and are therefore, themselves fiduciaries"); *see also Beauchem v. Rockford Prod. Corp.*, No. 01 C 50134, 2003 WL 1562561, at *1 (N.D. Ill. Mar. 24, 2003) (holding that an employer was not a fiduciary because "[n]othing requires or allows [the employer] control over the Plan Committee beyond appointing its members"). As Magistrate Judge Lehrburger concluded, "an appointing party does not have the unlimited fiduciary duty to monitor, supervise and evaluate the decisions of the trustees, nor does that party have liability for the decisions made by the trustees." *Hudson* R&R at 27.

Even assuming the Players Association has such a duty, Royal has not alleged facts sufficient to state a plausible claim.

B. Royal's allegations lack sufficient facts to render them plausible.

Royal does not allege a plausible breach of the duty to monitor. He never alleges that the Players Association does not monitor its appointees. He never alleges facts suggesting that the Players Association had notice of potential misconduct by its appointees. The sum of his allegations is that the Players Association "should have known" of the Retirement Board's alleged misconduct, and had it known, it would have "take[n] appropriate action" by "remov[ing] and replac[ing]" its appointees. Am. Compl. ¶¶ 79–80. The Court should not credit such conclusory allegations, and the duty-to-monitor claim should be dismissed, just as Judge Woods and Magistrate Judge Lehrburger dismissed the failure-to-monitor claim in *Hudson*. *Hudson*, 2019 WL 4784680, at *3 ("Plaintiff's allegations are not sufficient to state a breach of the duty to monitor, even as Plaintiff conceives of that duty."); *Hudson* R&R at 42 (recommending dismissal because Hudson "d[id] not allege any act or omission by the [Players] Association that would violate the limited duties it had").

In deciding a motion to dismiss a complaint for failure to state a claim pursuant to Federal Rules of Civil Procedure 8(a) and 12(b)(6), courts accept as true the non-conclusory factual

allegations in the complaint. *See Roth v. Jennings*, 489 F.3d 499, 501 (2d Cir. 2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662 (2009). But "[i]n assessing the sufficiency of a pleading, a court must disregard legal conclusions, which are not entitled to the presumption of truth." *In re: Sunedison, Inc. ERISA Litig.*, 2018 WL 3733946, at *3 (S.D.N.Y. Aug. 6, 2018). "A pleading that offers labels and conclusions or a formulaic recitation of elements of a cause of action will not do." *Iqbal*, 556 U.S. at 678 (internal quotation marks and citation omitted). Dismissal of a complaint or cause of action for failure to state a claim is appropriate where the complaint fails to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Rather, to survive a motion to dismiss, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Id.* The complaint must "possess enough heft to 'sho[w] that the pleader is entitled to relief'" by providing factual allegations "plausibly suggesting (not merely consistent with)" the required elements of the asserted cause of action. *Id.* at 557.

Royal does not allege or plead any facts suggesting that the Players Association "appointed unqualified trustees to the Retirement Board." *Hudson* R&R at 42; *In re Lehman Bros. Sec. & ERISA Litig.*, 2011 WL 4632885, at *7 (S.D.N.Y. Oct. 5, 2011), *aff'd sub nom.*, *Rinehart v. Akers*, 722 F.3d 137 (2d Cir. 2013), *cert. granted, judgment vacated*, 134 S. Ct. 2900 (2014) (dismissing a "duty to appoint" claim as "unsupported" and "not even squarely claim[ing] that [defendants] actually did appoint unqualified plan fiduciaries").

Similarly, Royal "does not allege facts about [the Players Association's] actual monitoring process and its specific shortcomings." *Nicolas v. Trustees of Princeton Univ.*, 2017 WL 4455897, at *5 (D.N.J. Sept. 25, 2017) (dismissing a duty-to-monitor claim). Royal never "take[s] issue with the actual procedures . . . used to monitor the board" and never alleges that "the [Players]

Association was aware of any red flags that should have alerted [it] to potential breaches of fiduciary duties by members of the Retirement Board." *Hudson*, 2019 WL 4784680, at *3. Without facts "showing how the monitoring process was deficient," Royal cannot "state a plausible claim." *White v. Chevron Corp.*, 2016 WL 4502808, at *19 (N.D. Cal. Aug. 29, 2016) (dismissing a duty-to-monitor claim).

Indeed, all Royal has pled is a conclusory allegation that "the NFL Players Association knew or in the exercise of reasonable diligence, should have known" of the Retirement Board's alleged breaches:

> 79. The NFL Management Council and the NFL Players Association knew or in the exercise of reasonable diligence, should have known that: (a) SPDs did not set forth an explanation of what constituted "clear and convincing evidence" or "changed circumstances," (b) the Board Defendants had interpreted "clear and convincing evidence" or "changed circumstances," (c) the interpretation of "clear and convincing evidence" or "changed circumstances," utilized by the Board Defendants was not the meaning of those terms and phrases as would be understood by the average participant in this Plan until the final decisions rendered by the Board Defendants, (d) the Board Defendants did not disclose the meaning of those terms and phrases to Plaintiff, (e) the SPDs discouraged Plaintiff from hiring an attorney to advise him in connection with his initial claim for benefits, (f) given the Board Defendants' interpretation and application of the phrases, "clear and convincing evidence" or "changed circumstances," Plaintiff would be harmed by applying for benefits before all the information and evidence was available to establish his proper classification, and (g) Plaintiff was not provided the relevant Plans or SPD prior to him applying for disability benefits and throughout the entire reclassification appeal process.

Am. Compl. ¶ 79. As Judge Woods explained in *Hudson*, the "complaint says absolutely nothing about the actions of . . . the [Players] Association with regards to [its] duty to monitor," and instead "simply states that because breaches occurred . . . the [Players] Association must not have properly monitored." *Hudson*, 2019 WL 4784680, at *3. "That is not enough to state a claim." *Id.* Royal's complaint, too, is "without any allegation as to how [the Players Association] knew or should have

known of" the alleged breaches. *Burgis v. New York City Dep't of Sanitation*, 798 F.3d 63, 70 n.10 (2d Cir. 2015). This "[t]hreadbare recital[] of the elements of a cause of action, supported by mere conclusory statements, do[es] not suffice" to state a claim. *Iqbal*, 556 U.S. at 678.

It is telling that Royal's complaint is replete with group pleading and fails to distinguish between Defendants. Royal alleges that "[t]he NFL Management Council and the NFL Players Association knew or . . . should have known" of the alleged breaches, and never pleads any allegation specific to either's purported failure to monitor. Am. Compl. ¶ 89. These allegations concerning state of mind "are entirely conclusory and not specific to any Defendant" and should not be credited. *Kinra v. Chicago Bridge & Iron Co.*, 2018 WL 2371030, at *6 (S.D.N.Y. May 24, 2018).

This lack of specificity poses special problems for Royal's failure-to-monitor claim. The Players Association does not have a duty to monitor the Retirement Board; at most, it has a duty to monitor its appointees, and Royal has levied no particularized allegations against them. Indeed, Royal has no allegations regarding the conduct of any individual member of the Retirement Board—each member "is described in a single paragraph by job title and relationship to the Plan, and is never mentioned again." *Kinra*, 2018 WL 2371030, at *6; Am. Compl. ¶¶ 22–27.

Royal's failure-to-monitor claim boils down to the allegation that the Retirement Board breached its duties, and therefore, the Players Association must have failed to monitor its three appointees. Royal has at most lodged allegations "that are 'merely consistent with' a defendant's liability," which "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). Royal's duty-to-monitor claim should be dismissed.

C. If Royal fails to plead a claim against the Retirement Board, his claims against the Players Association must fail too.

If this Court dismisses the underlying claims against the Retirement Board, Royal cannot state a claim against the Players Association. "A claim for breach of the duty to monitor requires an antecedent breach to be viable," and "[w]ith no antecedent breach by the monitored parties in this case, . . . [the] duty to monitor claim fails." *In re Bear Stearns*, 763 F. Supp. 2d at 580; *see also Hudson* R&R at 36 n.11. For this reason, the Players Association joins the arguments set forth in the Retirement Board's motion to dismiss, including the Retirement Board's request to strike Royal's jury demand. *See* Dkt. 16.

II. Royal has failed to plead an ERISA Section 502(a)(3) claim (Count IV).

In Count IV, Royal seeks a declaration that a "2017 Amendment" does not apply to him. Am. Compl. ¶¶ 82–87. As the Retirement Board explains, Royal does not identify the 2017 Amendment or suggest that it harmed him in any way, and absent an injury fairly traceable to the mysterious "2017 Amendment," Royal does not have standing to pursue Count IV. *See* Dkt. 16-2 at 11, 22–23. Magistrate Judge Lehrburger rejected the identical claim made by the complaint that Royal copied. *Hudson* R&R at 55–57 (dismissing identical claim about the "2017 Amendment" for lack of standing).

Additionally, as a threshold matter, Royal has not stated a claim against the Players Association because he has not alleged that the Players Association is a fiduciary "with respect to . . . the action subject to complaint." *In re Citigroup ERISA Litig.*, 662 F.3d at 135. He never alleges that the Players Association made the 2017 Amendment or decided to apply it retroactively to him. Indeed, his allegations never even mention the Players Association. *E.g.*, Am. Compl. ¶¶ 82–87. Thus, Magistrate Judge Lehrburger also concluded that because the Players Association

lacks the power to "substantively interpret, apply, or enforce provisions of the Plan," it is not an appropriate defendant to challenge a Plan amendment. *Hudson* R&R, Dkt. 90 at 38 n.12, 42.

Royal's Count IV should be dismissed.

III. Royal has failed to plead a claim under ERISA § 410(a) or ERISA § 404(a)(1)(A) and (B) (Count V).

Royal has failed to state a claim with respect to the Plan's limitations provision. Royal's Count V alleges that a provision of the Plan concerning the limitations period is ambiguous and *might* be interpreted as establishing a limitations period shorter than ERISA's. Am. Compl. ¶¶ 88–98. This claim fails for the reasons given by the Retirement Board—including that Judge Woods and Magistrate Judge Lehrburger found the identical claim in *Hudson* to be time-barred. *See* Dkt. 16-2 at 11, 23–25; *Hudson*, 2019 WL 4784680, at *3. Additionally, with respect to the Players Association, the claim "ha[s] no legal merit" because "the terms of the Plan merely give [the Players Association] the power to appoint three members of the Retirement Board—not substantively interpret, apply, or enforce provisions of the Plan." *Hudson* R&R at 38 n.12.

As explained *supra* at 8–14, to state a claim for breach of fiduciary duty, Royal must allege that the Players Association is a fiduciary "with respect to . . . the action subject to complaint." *In re Citigroup ERISA Litig.*, 662 F.3d at 135. Royal alleges that the Plan's limitation provision is ambiguous, but even assuming the Retirement Board interpreted the provision to conflict with ERISA (something Royal has not alleged), the Players Association would not be responsible for the Retirement Board's interpretation. *See* Plan § 8.2 ("The Retirement Board will have full and absolute discretion, authority and power to *interpret*, control, implement, and manage the Plan and the Trust." (emphasis added)). Nor does the Players Association have the power to write or alter the Summary Plan Description or to "sufficiently disclos[e]" information in the Summary Plan Description. Am. Compl. ¶ 97. And as explained *supra* at 11, the Players Association was not

acting as an ERISA fiduciary when it negotiated the Plan's (allegedly ambiguous) terms during collective bargaining.

Royal's Count V should be dismissed.

CONCLUSION

For these reasons, the Court should grant the Players Association's Motion to Dismiss.

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By: s/ Jeffrey L. Kessler

Jeffrey L. Kessler
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166-4193
Tel.: (212) 294-6700
Fax: (212) 294-4700
jkessler@winston.com

William G. Miossi
(*pro hac vice petition forthcoming*)
Mary M. Lenahan
(*pro hac vice petition forthcoming*)
Paul N. Harold
(*pro hac vice petition forthcoming*)
Winston & Strawn LLP
1700 K Street NW
Washington, DC 20006
Tel.: (202) 282-5000
Fax: (202) 282-5100
wmiossi@winston.com
mlenahan@winston.com
pharold@winston.com

Attorneys for Defendant National Football League Players Association